No. 93-1535

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

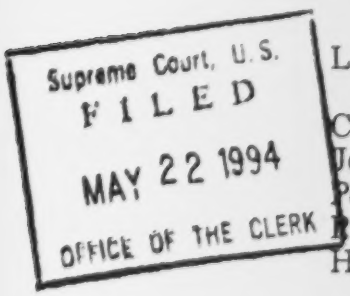
WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION and
MON VALLEY ENERGY CORPORATION,
Respondents,

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION



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QUESTIONS PRESENTED

Pursuant to section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824 a-3, the Federal Energy Regulatory Commission (FERC) promulgated rules requiring electric utilities to buy power from entities described in the statute as "qualifying facilities," and requiring that state regulatory commissions carry out the rules. At the request of petitioners, the Pennsylvania Public Utility Commission (PUC) reviewed a contract between a qualifying facility and a utility and approved it, but due to petitioners' litigation, the original contract due dates could not be met. Thus the PUC approved modifications to the due dates and updating of the payment schedule. The questions presented are:

1. Whether PURPA and the FERC regulations allow the PUC to extend contract milestone dates and update capacity payments, when the contractual relationships would otherwise have terminated due to litigation delays caused by the petitioners?

2. Given that one Petitioner (Armco/Allegheny) previously argued for an "avoided cost" calculation made on the date of contract signing—the position adopted by the Pennsylvania Commonwealth Court—and that the other Petitioner (West Penn) originally argued for avoided cost calculations made prior to contract signing, and when both petitioners argue a different position in the petition for certiorari, should the Commonwealth Court decision be upheld?

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OPINIONS BELOW

This is a case which the Pennsylvania Supreme Court declined to accept for review. The decision of the Pennsylvania Commonwealth Court, affirming the decision of the PUC, therefore remains undisturbed. 150 Pa. Commonwealth Ct. 349, 615 A.2d 951 (1992); (3a-34a). The PUC rendered its order approving milestone date extensions and capacity rate updating on January 14, 1992. (380a-396a).

The PUC originally reviewed the contract between West Penn Power Co. (West Penn), an electric public utility, and Mon Valley Energy Corporation (Mon Valley) the developer of the Shannopin Project, which is a cogeneration facility, and granted West Penn's petition to approve the contract by declaratory order. (36a-85a). The order approved other contracts as well, holding that rates to be paid were below avoided costs and that West Penn needed capacity. (71a-77a, 84a). Subsequently, in considering Armco/Allegheny's appeal of PUC approval of another West Penn contract, the Commonwealth Court determined that evidentiary hearings to consider contract approval would be proper. *Barasch v. Pa. Public Utility Commission,* 119 Pa. Commonwealth Ct. 81, 546 A.2d 1296 (1988) *(Milesburg I), allocatur denied,* 523 Pa. 65, 567 A.2d 655 (1989). Since several parties had filed exceptions to the order approving the contract with Mon Valley and other projects, the PUC considered that the *Milesburg I* holding could be applicable to all projects. Thus the contracts were consolidated for evidentiary hearings. (86a-93a).

An administrative law judge (ALJ) for the PUC considered all evidence submitted and rendered a 104-page recommended decision[1] on June 8, 1989. The ALJ held that Mon Valley would be entitled to sell power to West Penn, at

[1]A "recommended decision", under Pennsylvania statutory law, is one that does not become a final PUC decision until it is affirmatively acted upon, i.e., it is "advisory" only, until the agency acts on the matter. 66 Pa. C.S. §331 and 335.

rates determined in the same time period as those in the contract, in accord with the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §824 a-3. (105a-205a). The ALJ's decision addressed numerous questions, including whether any other claims of West Penn and Armco/Allegheny should be granted. The PUC's order of September 29, 1989 (222a-272a), adopted the ALJ's recommendation on virtually all substantive issues, but reversed the recommendation as to contract due dates for two other qualifying facilities, Milesburg Energy Inc. (Milesburg) and North Branch Energy Partners, L.P. (North Branch or "Burgettstown")

West Penn appealed from the PUC's order insofar as modifications to contracts for the Milesburg and the North Branch projects had been approved ("Phase Two "), and Armco/Allegheny appealed that issue and the time for calculation ("Phase One") issue for all three contracts. Commonwealth Court affirmed the PUC's modification of the contracts ("Phase Two"), but remanded the contracts for updating of calculations to the time of contract signing.[2] (278a-289a). There were no "Phase Two" issues in the order addressing Mon Valley's project, since it had not then sought contract modification. Although the Pennsylvania Supreme Court did not accept the Mon Valley case for review, it did accept appeals concerning the companion Milesburg project. This culminated in affirmance of the Commonwealth Court decision. *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission*, 135 Pa. Commonwealth Ct. 15, 579 A.2d 1337 (1990) *aff'd*, ___ Pa. ___, 634 A.2d 207 (1993), *petition for cert. filed* (U.S. February 22, 1994) (No. 93-1341).

Since the proceedings were still pending, Mon Valley sought a "Phase Two" extension of contract due dates and updating of capacity payments. The PUC referred the matter to the ALJ for evidentiary hearings and on April 29,

[2]Although the cases were argued together, and all came from the same PUC order, different orders were issued by Commonwealth Court.

1991 the ALJ rendered a recommended decision that Mon Valley be accorded "Phase Two" relief consistent with that affirmed by Commonwealth Court for the other projects. (315a-379a). The PUC adopted the ALJ decision (380a-396a) and Commonwealth Court affirmed. (3a-34a).

The PUC, on remand of the "Phase One" decision concerning Mon Valley, approved recalculations as of the date of contract signing (407a-416a), but petitioners appealed again. Commonwealth Court again remanded for further recalculations as of the date of contract signing. 154 Pa. Commonwealth Ct. 136, 623 A.2d 383 (1993) *(Shannopin III)* [3] (417a-427a). That proceeding is currently pending before the PUC.

JURISDICTION

There is no basis for jurisdiction in the Supreme Court of the United States under 28 U.S.C. 1257. Statutory validity is not here at issue, and petitioners have not claimed a "title, right, privilege or immunity", under 16 U.S.C. 824a-3, the only statute in issue.

STATEMENT OF THE CASE

This statement is intended to correct the statement of the case set forth in the Petition for Certiorari.

A. Introduction and legal background.

This case concerns the requirement that electric public utilities make purchases from certain types of independent power producers, under PURPA §210, 16 U.S.C. §824 a-3. PURPA §210 requires that FERC promulgate rules concerning sales by independent power producers, and then requires implementation of the FERC rules by state regu-

[3] Although the developer is Mon Valley, the case references use the name of the site of project i.e., "Shannopin," and are numbered chronologically by Commonwealth Court order date.

latory agencies. In essence, state utility regulatory agencies became the surrogate for FERC in regulating these transactions. The FERC rules (regulations) could not provide for rates in excess of the utility's incremental cost for alternative electric energy. 16 U.S.C. §824 a-3(d). At 18 C.F.R. §292.101(b)(6), FERC defined "avoided costs" as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility . . . such utility would generate itself or purchase from another source." FERC required utility payments to equal avoided cost, which is the "full avoided cost" requirement. Payments equal to avoided costs are just and reasonable and in the public interest. 18 C.F.R. §292.304(a)(1) and (b)(2). The PUC implemented FERC's regulations pursuant to the requirements of 16 U.S.C. §824a-3(f) by adopting its own regulations in 1982, after extensive hearings and comments. 52 Pa. Code §§57.31-57.39.

The FERC regulation at 18 C.F.R. §292.301(b) allows a qualifying facility to agree to rates, terms or other conditions differing from those which otherwise could be required in the regulations. Thus the regulations are not mandatory, if the qualifying facility chooses to relinquish specific benefits. FERC expressly recognized this in its Preamble, 45 *Fed. Reg.* 12217 (February 25, 1980), indicating that 18 C.F.R. §§292.301-308 did not preclude agreements with different terms and that such agreements "do not violate the Commission's rules under section 210 of PURPA." The regulations do not state that such a contract is outside the scope of FERC and derivative PUC jurisdiction nor does anything indicate that intent. FERC joined §292.301(b) with other regulations providing benefits to qualifying facilities, and did not establish two completely separate classes of contracts, which it easily could have done.

The authority exercised by the PUC was simply to allow a qualifying facility the benefits of a contract it signed. In sum, what the PUC did was to hold that contract "milestones" or due dates jeopardized by litigation delays should

not cause the termination of a qualifying facility's right to sell power under terms it agreed to (385a-386a, 394a), when that qualifying facility had done everything it could to enter into a legally enforceable obligation, at the latest on the date of contract signing (October 15, 1987).[4] West Penn and Armco/Allegheny filed appeals repeatedly, causing the delay which prevented the qualifying facility from meeting the milestone dates. (385a-386a, 415a, 429a-430a). Armco/Allegheny sought to have the PUC reject or modify the contract, claiming the "voluntary" terms were unlawful, until the milestone dates could not be met; then Armco/Allegheny and West Penn claimed the "voluntary" milestone dates could not be extended under the PUC's PURPA authority.[5] Mon Valley could not meet the due dates or on-line dates in the original contract solely due to litigation. (382a-383a, 385-386a). The PUC reasoned that since it had PURPA authority to direct a utility to enter into a contract with milestone dates, it could maintain the status quo by using the contract signed by West Penn, and directing insertion of new milestone dates and updating capacity payments to reflect litigation delays. (307a). This result was upheld by the Commonwealth Court.

Contrary to the misstatement by petitioners, since the rate is calculated by West Penn's method as in the contract originally signed by West Penn, (which after exhaustive hearings was found to be below full avoided costs, 269a), the rates are not in excess, much less "far in excess" of avoided costs. Petitioners admit West Penn negotiated and agreed to the rate (Petition, p. 5), but then say the exten-

[4]The PUC consistently took the position, originally proposed by West Penn, that avoided costs calculated prior to contract signing do not violate 18 C.F.R. §292.304(d)(2). However, in *Milesburg II* Commonwealth Court held that the regulation means that rates must be recalculated as of the contract signing date and the Pennsylvania Supreme Court was evenly divided on whether to reverse that point.

[5]"Voluntary" is a reference to petitioners' terminology—the PUC contends the FERC regulations do not define contracts as "voluntary" or "involuntary."

sion of milestone dates somehow made the originally reasonable rate become unreasonable. Petitioners argue, from "evidence" not of record (Petition, p.5), that rates exceed avoided costs, based on the presumption that avoided costs should be *zero,* i.e., based on no capacity need (349a), a claim rejected by the ALJ. (350a-352a). Even West Penn's generation plans as of April 16, 1990, included Mon Valley's Shannopin Project. (329a).

Petitioners now equate the time of Mon Valley incurring a "legally enforceable obligation," under 18 C.F.R. §292.304(d)(2), to the date of the PUC order approving the contract modifications, a date unrelated to Mon Valley's obligation, and a date not countenanced by Pennsylvania courts. (288a-289a). Petitioners themselves have advocated different possible legally enforceable obligation dates. West Penn entered the contract and first asserted that its calculation date prior to signing the contract was correct. (140a-141a). However, when the PUC directed contract extensions, due to appellate litigation delay, West Penn then claimed the original calculation date could no longer serve as the basis for calculating payments, a position rejected by the PUC. (390a-394a).

Armco/Allegheny argued for recalculating avoided costs as of the date of contract signing, claiming PURPA required that, in proceedings before the PUC. (141a). Commonwealth Court accepted the principle that avoided costs should be calculated as of the date of the contract signing, the very point argued by Armco/Allegheny. Before the Pennsylvania Supreme Court, Armco/Allegheny argued the legally enforceable obligation date should be either the date of the PUC order or the date on which qualifying facility certification was obtained. Pennsylvania Supreme Court Justice Papadakos, viewing these shifting contentions and commenting on PUC concerns that avoided cost calculations tied to the "legally enforceable obligation" date could become a constantly moving target, wryly noted: "This fear seems well founded." *Armco Advanced Materials Corp., v. Pennsylvania Public Utility Commission,* ___ Pa. ___, 634 A.2d 207 (1993), *petition for*

cert. filed (U.S. February 22, 1994) (No. 93-1341). *(Milesburg II).*

The petitioners misrepresent the effect of the dissent in Commonwealth Court's review of the PUC's decision in this case and continue to mischaracterize the Pennsylvania Supreme Court's action in *Milesburg II.* In the instant case, the dissent did not dispute the authority of the PUC to extend milestone dates: "I do not disagree that the PUC can extend milestone dates set forth in a purchase agreement if necessitated by litigation delay to foreclose the purchase agreement to prevent it from lapsing under its own terms." *West Penn Power Co. v. Pennsylvania Public Utility Commission,* 150 Pa. Commonwealth Ct. 349, 615 A.2d 951 (1992) *(Shannopin II).* (31a). However, the author of the dissenting opinion would have had the PUC inquire, at the time it considered milestone extensions, into then-current avoided costs, i.e., there was unanimity among the Court that the PUC had authority to make the modifications but disagreement over the substantive result of the PUC's order. And the Pennsylvania Supreme Court in *Milesburg II* was unanimous in affirming the Commonwealth Court's "Phase Two" decision relevant here, not "equally divided" as petitioners claim.

B. The Agreement and the PUC Proceedings.

Whether Mon Valley can sell power to West Penn has been before the PUC and appellate courts for over six years, although Mon Valley obligated itself to sell its power and has done what it can to achieve that result. (325a-327a). At West Penn and Armco/Allegheny's insistence Mon Valley has had its contract with West Penn reviewed three times by the PUC and reviewed three times by the Pennsylvania Commonwealth Court. (429a-435a). This proceeding began on January 20, 1988 when West Penn filed a petition with the PUC seeking approval of its power purchase agreement with Mon Valley and approval to collect from ratepayers the amounts West Penn would pay. West Penn calls such an agreement an Electric Energy Purchase Agreement or "EEPA."

Consistent with its practice, the PUC treated the West Penn petition as a petition for a declaratory order that the utility's agreement did not violate PURPA or state law; that the payments were at or below avoided costs; and, that the payments could lawfully be recovered like other purchased power costs. (63a-85a). Thus the PUC decided the case on the basis of the pleadings, federal and state law and the utility's filings at the PUC. (36a-85a). A PUC order granting the West Penn petition and approving the Mon Valley EEPA was entered on July 8, 1988. (84a-85a). That order concluded that the capacity payment by West Penn to Mon Valley was below the capacity payment West Penn could be required to pay under the PUC's regulations implementing PURPA §210, at 52 Pa. Code §§57.31 - 57.39. (84a-85a).

Subsequently, on August 22, 1988 Commonwealth Court issued a decision vacating the Commission's order approving the contract between West Penn and Milesburg (another qualifying facility), holding, at Armco/Allegheny's urging, that utility customers should have notice and an opportunity to participate in some type of hearing concerning the price of capacity payments. Armco/Allegheny wanted hearings so contracts could be modified if payments exceeded avoided costs. West Penn was also an appellant there, claiming ratepayers should have notice of the contract approval process. The Commonwealth Court remanded that proceeding to the Commission with directions (1) that West Penn notify all customers about the contract filing by individual notices and (2) that the PUC hold hearings on the contract. *Barasch v. Pennsylvania Public Utility Commission*, 119 Pa. Commonwealth Ct. 81, 546 A.2d 1296 (1988) *(Milesburg I)*. On September 30, 1988, the PUC entered an order requiring notice of the filing of the Milesburg petition in a West Penn bill insert so it could be consolidated with proceedings on other contracts (86a-93a) and on January 19, 1989 entered an order on reconsideration. (94a-104a). Various petitions for extension of the milestone dates, responses thereto, and ALJ and PUC orders led to a procedural quagmire, prior to and during the evidentiary hearings. (115a-119a).

Hearings in the consolidated proceeding were held from April 3 through April 12, 1989. Testimony from twenty witnesses, twenty-eight statements and 162 exhibits were admitted into the record. (118a). The ALJ's recommended decision of June 8, 1989, consisted of two sections, "Phase One" and "Phase Two". (106a-107a). Phase One of the decision held that West Penn's input assumptions into its formula for calculating the various payments for capacity under consideration were reasonable, and that the various capacity payments were at or below West Penn's costs for capacity it would build itself, determined by either West Penn's formula *or* the PUC's regulations. Essentially, Phase One of the decision addressed the rate aspects of the consolidated proceedings and concluded that under PURPA the rates set forth in the various EEPAs, including the Mon Valley EEPA, were reasonable. (131a-189a). The ALJ found that all factors used in calculating the payments were reasonable, as was the time frame for fixing the calculations. (140a-146a). Armco/Allegheny was the only party to file an exception on this point, again arguing that under PURPA the date of contract execution was the date of the "legally enforceable obligation," so that was the proper time-frame for fixing the utility's avoidable costs and the price it should pay. (229a). The decision also held that West Penn needed capacity. (161a-162a). In 1989, considering the evidence, the ALJ concluded West Penn had submitted substantial evidence in support of adding 900 MW of coal units to meet resource needs. (168a-169a).

In Phase Two, the ALJ rejected Milesburg's petition to extend the contract due dates and update its payment stream for the later on-line date, based on a particular provision of state law (66 Pa. C.S. §508),[6] and rejected North Branch Energy Partners', request for contract extensions. However, he found that Milesburg had a PURPA right to

[6]Section 508 provides that the PUC may revise "public interest" contracts (which typically are those involving allocation of utility line relocation costs for highway and rail crossings), so it had never been applied by the PUC to QF/utility contracts (and still has not). Since it applies to "existing" contracts, the ALJ concluded Section 508 could not authorize changes to a contract which had technically lapsed.

sell power under the PUC's "PURPA regulations," notwithstanding the lapse of its contract with West Penn and also found Milesburg would have that right as of the same time that the original rate calculations were made by West Penn. Since all parties agreed rates under the PUC regulations would have been higher, the ALJ decision in essence was that, although Milesburg could not insist on the contract terms, it was legally entitled to rates higher than the contract provided. (267a).

The final PUC opinion and order entered September 29, 1989 for the most part adopted Phase One of the ALJ's decision, but reversed Phase Two on the basis of PURPA authority over qualifying facilities/utility relationships. (222a-272a). The PUC regulations at 52 Pa. Code §§57.31 - 57.39 specifically provide a method for calculating rates a qualifying facility is entitled to as a matter of law, as the PUC order recognized. (261a). The order held that West Penn was obligated under PURPA §210 to purchase Mon Valley's power at rates in the contract. (265a). With respect to Phase Two, the PUC directed West Penn to enter a "new" contract with Milesburg, identical to the original contract but for milestone date extensions and modifications to reflect the later in-service date of the facility, and extended the Burgettstown contract due dates. (259a, 265a-266a).

C. The Pennsylvania Commonwealth Court Decision

Appeals by Armco/Allegheny and West Penn followed. Armco/Allegheny appealed from "Phase One" (the time period for calculation of the rates), arguing the calculation should have been made on the dates of contract signing. West Penn appealed concerning "Phase Two" issues i.e., the milestone date and in-service date changes. West Penn did not appeal to Commonwealth Court concerning the "Phase One" issue of whether avoided cost could be calculated prior to contract signing, since West Penn itself had done just that, so West Penn did not appeal the PUC decision with respect to the Mon Valley contract. The "Phase One" issue should not properly be considered the subject of this Petition for Certiorari, since its sole proponent,

Armco/Allegheny, won the issue in Commonwealth Court and that decision was sustained by the Pennsylvania Supreme Court.

The Commonwealth Court affirmed the PUC's direction that West Penn render an EEPA with Milesburg identical to the one originally presented by the utility (Phase Two) but with extensions of milestone dates, finding the PUC action was an appropriate exercise of its broad authority, under PURPA, to implement PURPA §210. It also approved the contract modifications for Burgettstown, in an unpublished opinion. *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission,* Nos. 2090 and 2097 C.D. 1989, filed September 7, 1990 (Burgettstown). However, the Commonwealth Court reversed the PUC's Phase One determination. The Court directed that the review of calculations (of avoided costs) be based on the date of contract execution. *Armco Advanced Materials Corp. v. Pennsylvania Public Utility Commission,* 135 Pa.Commonwealth Ct. 15, 579 A.2d 1337 (1990) *(Milesburg II).* Contrary to petitioners' claim, however, the Court did not refer to PURPA itself as the underpinning for its decision, but specifically referenced the FERC regulations and the FERC requirement of "full avoided costs" as the basis for its conclusion. (284a-286a).

The Court held that when a utility conditions a contract upon PUC approval "and submits the contract to the PUC to obtain such approval, the situation does not involve the private agreement contemplated by §292.301(b). The state PUC's review of such a petition appears to be proper under the §292.401 grant of authority to take 'any other action reasonably designed to implement (the FERC regulations).'" *Milesburg II,* 135 Pa. Commonwealth Ct. at 21a-22a, 579 A.2d at 1340a-1341a. In other words, the Court simply found that the PUC necessarily had jurisdiction over the contract pursuant to PURPA. Virtually all the parties, including West Penn and Armco/Allegheny, urged the Court to find the PUC had authority to act upon the contract. In context, the holding of the referenced portion of the Court's order is that the PUC had authority over the contract under PURPA.

The Court held that the West Penn submittal of the contract for PUC approval invoked "the full power and duty of the PUC to examine all of the contract's terms . . ." under PURPA and the FERC regulations. *Milesburg II*, 135 Pa. Commonwealth Ct. at 37, 579 A.2d at 1348. The Court thus recognized that the PUC had PURPA authority to make a contract, different from state law-derived authority, so it could exercise that PURPA authority to extend milestones.

D. The Pennsylvania Supreme Court Decision in *Milesburg II*.

West Penn and Armco/Allegheny appealed Commonwealth Court's "Phase Two" decision in *Milesburg II* to the Pennsylvania Supreme Court, challenging the lower court's holding that the PUC had PURPA authority to direct West Penn to enter a new contract, identical to the negotiated contract but with milestone date and on-line date related changes. Armco/Allegheny also claimed the date for calculation of avoided cost should be the date of the PUC order or date of qualifying facility certification or, in response to the PUC appeal, that the lower court correctly concluded the calculation date should be the date of contract signing. *Milesburg II*, 634 A.2d at 211. The PUC appealed from the "Phase One" part of the decision, arguing that 18 C.F.R. §292.304(d)(2) should not be read to restrict avoided cost calculation to the date of contract signing, as the lower court had held, but that prices calculated and agreed upon prior to that date (as Mon Valley and West Penn did here) did not violate §292.304(d)(2), i.e., that the regulation was not exclusionary. While the written opinion describes why the PUC should have the discretion to determine the calculation date, the Court split evenly on that question, so the "time of contract signing" remains the law in Pennsylvania. *Id.* 634 A.2d at 208. However, the Court unanimously affirmed the PUC's authority to change the milestone dates, as had the lower court.

E. Mon Valley contract modification proceedings before the PUC.

Since Commonwealth Court had not then rendered its *Milesburg II* and *Shannopin I* orders, Mon Valley's contract due dates could not be met, thus it filed a petition asking for extensions and a capacity payment change to reflect a later on-line date. (322a-325a). West Penn opposed the petition, contending that PURPA "limits the Commission's power to act", so the PUC could not consider contract changes. The PUC stated: "It is absurd to contend that the Commission can direct a utility to make a purchase but cannot direct modifications to an agreement which will allow that purchase to go forward." Order entered May 10, 1990. (307a). By that order, the PUC referred the matter to the ALJ who had heard all other respects of the proceedings.

Petitioners have asserted that changes in the "renewed" contract caused a rate higher than avoided cost, which is untrue. West Penn estimates the costs it would incur to build a new plant ("avoided cost"). Specific payments to qualifying facilities are based on factors such as the on-line date of the qualifying facility. With a qualifying facility on-line date closer to the utility plant date, the qualifying facility receives more money, although the avoided cost (cost of the plant used as the calculation basis) never changes. That is precisely what happened here. (350a-352a).

While the ALJ recognized avoided costs would be the subject of the *Shannopin I* remand, thus avoided costs not be at issue in *Shannopin II* (348a), petitioners Armco/Allegheny nonetheless (in 1990) claimed West Penn did not need capacity, so its avoided costs were "zero." (349a). The PUC did not accept this view. (387a). The ALJ approved the requested Mon Valley modifications, finding they would not affect the avoided cost calculations and finding this was consistent with the *Milesburg II* and *Burgettstown* Phase Two decision of Commonwealth Court. (345a-346a, 376a-379a). The PUC adopted the ALJ's decision. Since petitioners had, on exceptions, again raised the argument

that the PUC "lacked jurisdiction" to approve contract modifications, the PUC again stated that its actions were lawful and consistent with the *Milesburg II* decision. (384a). The PUC order also dismissed petitioners' claims that the modifications "transformed" the contract into a new contract requiring recalculation of payments, as being the same arguments made and rejected by the Commonwealth Court in Phase Two of the *Milesburg II* and *Burgettstown* decisions. (390a). Petitioners appealed the PUC decision.

F. Mon Valley contract modification proceedings before the appellate courts.

The Commonwealth Court affirmed the PUC's order. (3a-26a). In so doing, it addressed Armco/Allegheny's argument, that if the modifications were upheld, then under 18 C.F.R. §292.304(d), the original contracts rates would have to be recalculated at a later date; the "more up-to-date the avoided cost inputs are, the lower the avoided cost rate...." (19a). The Court rejected this contention and West Penn's contention it would only need "low capital cost" plants:

> This argument appears to be disingenuous based on West Penn's conduct and the contract it entered with Mon Valley for Shannopin's capacity when it first sought Commission [PUC] approval of the original EEPA.

Shannopin II (20a).[7]

The Commonwealth Court decision was authored by President Judge Craig, who as author also of the *Milesburg I, Milesburg II, Shannopin I* and *Burgettstown* decisions was familiar with the facts and law of the cases. Petitioners

[7]Contrary to petitioners' statement, the quoted passage of the Court's opinion does not refer to West Penn's "stricken testimony" but rather refers to petitioners' arguments that modification required a new determination of avoided costs. (19a-20a).

mischaracterize the dissent there as stating it would "require" the PUC to "rescue" ratepayers; the text reveals that "require" was not used but that "can" was the operative word. That comment was directed at PUC consideration of additional evidence, since the remand proposed by the dissent would have been for taking evidence on avoided cost changes. (34a). The dissent, however, was specifically in accord with the majority as to PUC authority to make the contract modifications. (31a). The dissent focused on West Penn's non-record evidence as indicating a need for further evidentiary review by the PUC, which the dissent would have required, not on questions of law.

Petitions for allowance of appeal were denied on December 20, 1993. (1a, 2a).

REASONS FOR DENYING THE WRIT

The Petition for Certiorari is bereft of any indication that there may be "special and important reasons" for granting certiorari. This is a case the Pennsylvania Supreme Court declined to accept for review. Although the factual and procedural history of the case is nightmarish, confusing even to the participants, the aspect of the case petitioners would have reviewed here is the mundane act of extending contract milestone dates and payment schedules. While petitioners have attempted to show confusion among states and important questions of law where none exists, the picture they paint ultimately shows no more than their dissatisfaction with federal law, and the way it was applied in Pennsylvania. This is just another case with a utility complaining about some arcane aspect of regulation undertaken by a state regulatory agency. West Penn and Armco/Allegheny ultimately want this Court to substitute its judgment on the facts for those of the Pennsylvania courts.

The *Milesburg II* decision was irrefutably the basis for the decision here. The Pennsylvania Supreme Court decision in *Milesburg II*, unanimously affirming the decision of the lower appellate court, decided no "federal question" in

a way conflicting with other courts. Indeed, the statute in question (PURPA §210) is inapplicable to Armco/Allegheny; it is Mon Valley upon which the statute confers benefits, and it has not sought certiorari. The Pennsylvania Commonwealth Court decided the case on the law and facts of extremely limited circumstances concerning modification of one contract.

Even had petitioners established that there were a federal question presented, and established that results achieved in other states were different (they have not), there would be no conflict with PURPA or the FERC regulations. The FERC regulations are specifically intended to allow flexibility to the states in implementing the regulations, 18 C.F.R. §292.401-403, as this Court recognized in *FERC v. Mississippi*, 456 U.S. 742 (1982). The FERC regulations require that state action be consistent with PURPA and the FERC regulations but the state regulatory agency can issue regulations and take "any other action reasonably designed to implement (the FERC regulations)." 18 C.F.R. §292.401(a).

By definition, any review of the intermediate court decision here will be limited to the facts of implementation of the FERC regulations in Pennsylvania. Regardless of the decision, without invalidating the FERC regulations or its delegation of authority to state PUC's, it will not affect specific implementation in other states; that is up to FERC to change. If FERC wished uniformity among states it could easily have accomplished that by having rules with no room for deviance.

There is no national issue presented that requires this Court's attention. In fact, petitioners argue that Pennsylvania courts erred by finding the PUC *did* have authority under federal law, to act to insure compliance with PURPA's requirement that qualifying facilities are entitled to sell power to utilities. Armco/Allegheny and West Penn are seeking help in avoiding PURPA requirements, not compliance therewith. Interpreting PURPA is, after all, what FERC did in promulgating its regulations, upheld by

this Court in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983), so "interpretation" of PURPA should not be at issue here. The PUC simply held Mon Valley was entitled to a contract it already had, since it certainly had committed to a legally enforceable obligation. Allowing a contract to this small power plant is hardly a question of national importance.

The result of *Milesburg II*, *Burgettstown* and *Shannopin II* will diminish in importance relative even to PURPA implementation in Pennsylvania alone (primarily affecting the three qualifying facilities having contracts with West Penn). Since it is now known that contracts will be examined as of the execution date, and that *Milesburg I* allows hearings, hopefully milestone and on-line date provisions in contracts will take these factors into consideration. That could not have happened here, since *Milesburg I* had not been decided when the cases began.

Even were the unanimous decisions of the Pennsylvania appellate courts wrong, that alone would not justify certiorari. *Ross v. Moffitt*, 417 U.S. 600 (1974). Whether this Court might decide a case differently is not a sufficient reason for granting certiorari. *Watt v. Alaska*, 451 U.S. 259, 275 (1981). The petitioners present no meritorious issues to be reviewed, or even a set of consistent positions; instead, they seek to create a legal purgatory of constantly shifting dates for calculation of payments under PURPA and the lack of authority for a PUC to extend milestone dates.

Petitioners must establish something more than a "wrong decision" to demonstrate why certiorari should be granted. In *Idaho Dept. of Employment v. Smith*, 434 U.S. 100, 104 (1977), Justice Stevens contended that, even where there was a clear error in the Idaho Supreme Court's decision, since there also was no question of national importance, certiorari was unwarranted. There was no error here and no question of national importance. PURPA is sufficiently clear, particularly in that it delegated to FERC the responsibility to formulate a national scheme of

regulation of qualifying facilities' relationships with utilities. FERC's regulations in turn provides specific parameters, but leave discretion to the states in implementation, which is also quite clear. No question of PUC action consistent with those parameters, but undertaken within the area of flexibility, can be considered a federal question of importance.

Alleging conflicts where none exist, referring to dollar amounts not in issue, taking inconsistent positions and asserting only vaguely why this Court should review this case, petitioners have failed to show any reasons for granting certiorari.

I. Because the FERC regulations allow flexibility to the states to implement those regulations, Commonwealth Court correctly affirmed the PUC's decision on contract milestone dates and payment updates, thus there is no question worthy of this court's exercise of jurisdiction.

Although petitioners note that §292.301(b) of the FERC regulations provides that agreements with terms differing from the regulations are permissible, they misunderstand the meaning of §292.301(b). FERC explained in its Preamble:

> Some commenters indicated that §292.301(b)(1) might be interpreted as prohibiting a State from reviewing contracts for purchases.
>
> * * * *
>
> These rules, and the exemptions being provided by these rules, are not intended to divest a State regulatory agency of its authority under State law to review contracts for purchases as part of its regulation of electric utilities. Such authority may continue to be exercised if consistent with the terms, policies and practices under sections 210 and 201 of PURPA and this Commission's implementing regulations. If the authority or its exercise is in conflict with these sections of PURPA or the Commission's regulations

> thereunder, the State must yield to the Federal requirements. The Commission does not believe it possible or advisable to attempt to establish more precise guidelines than these.

Preamble, 45 *Fed. Reg.* 12,233 (February 25, 1980).

Neither the Pennsylvania courts nor the PUC have suggested the PUC should or could exercise unfettered discretion under PURPA to modify contracts submitted to it. What the PUC does say, and Pennsylvania courts have unanimously adopted as a proper exercise of its mandate and authority under PURPA in this case, is that the PUC may act, judiciously and sparingly, to approve contract modifications, particularly those preserving the status quo, to the extent they are consistent and in accord with what the PUC could have directed the parties (QF and utility) to do in the first place, as defined in PURPA and specifically in the FERC regulations. The PUC could not modify a contract to be contrary to the requirements of those regulations. Thus while the PUC cannot act to require a qualifying facility to waive an entitlement provided by federal law, it may approve a contract where a qualifying facility waives rights (18 C.F.R. §292.301) or it may determine qualifying facilities have specific PURPA rights. Indeed, since the PUC's authority emanates from PURPA and the FERC regulations, the PUC could not act inconsistently with those regulations.

The scope of PUC authority under PURPA can be measured by considering what the PUC is empowered to do. If Mon Valley had filed a petition with the PUC seeking approval of a contract and offered a contract signed by it on October 15, 1987, the PUC could have found that was the date on which Mon Valley had committed to a "legally enforceable obligation" pursuant to §292.304(d)(2). The PUC could approve a contract with the terms prescribed by West Penn, and could find that the rates to be paid under the West Penn formula, which changed according to the particular QF on-line date, were at or below full avoided costs. Finally, the PUC could approve contract provisions

setting out milestone dates tied to the date of a final order, i.e., dates contingent upon termination of the proceeding. All these things are exactly what happened. The PUC had the authority to approve all these things, at least with Mon Valley's consent, and direct that they be done pursuant to PURPA. There was no aberrant exercise of PUC authority; no act inconsistent with PURPA; no approval by Pennsylvania courts of acts exceeding PURPA; and, no conflict with a decision of any other state court.

The mandate to implement FERC regulations requires something beyond simple enforcement of those regulations. It means that PURPA authorizes the PUC to exercise jurisdiction over qualifying facility/utility relationships to insure compliance with PURPA, i.e., to insure utilities bargain fairly with QF's. The PUC cannot endorse agreements whose provisions are contrary to public policy set forth in PURPA. Since the PUC can direct the entry of contracts, it is absurd to say it cannot direct changes to contacts presented to it when necessary to carry out the purpose of PURPA—such a view *would* discourage QF's from entering voluntary agreements.

Nothing indicates there is a federal policy "favoring free negotiation of long term contracts"—utilities did not sign such contracts prior to PURPA—so the PUC and Pennsylvania Courts could not have affected a non-existent "policy". Further, the PUC has wholeheartedly endorsed milestone dates, but recognized in the unforeseen circumstances of this case, failure to extend such dates would be completely inequitable.

Petitioners have cited cases from other states as ostensibly conflicting with the decision here. This is not so. Petitioners first cite *Public Utility Commission of Texas v. Gulf States Utilities Co.*, 809 S.W.2d 201 (Tex. 1991) *(Gulf States)*. In that case, the utility entered a contract with payments in excess of the utility's avoided cost. The utility submitted its contract to the Texas Commission for approval. The commission stated the utility could not recover any payments above avoided cost. The Texas Commission had promulgated its own "PURPA regula-

tions" but one Texas regulation stated rates could not exceed avoided costs, while another regulation allowed deviation in rates and other terms. The Texas Commission attempted to "reconcile" these regulations by prohibiting the utility from recovering payments in excess of avoided cost, which the court held was error. The way to reconcile the two regulations was to find the avoided cost "ceiling" only applied when the commission *ordered* a utility and qualifying facility to enter into a contract; when, on the other hand, the utility and qualifying facility *voluntarily* agreed on the rate provisions, the commission had to respect the regulation allowing voluntary deviance from the rates under the regulations. The court found nothing in the FERC regulations compelled a different result. However, the court stated the commission retained its authority to determine whether payments above full avoided cost would ultimately be recoverable, but the commission could not *automatically* disallow recovery—the utility would have the opportunity to establish that such payments were just and reasonable. Applying *Gulf States* to this case would have meant Armco/Allegheny could not litigate the rate level in the first place, since that holding prohibited inquiring into the rate provisions of voluntary contracts.

This decision is not inconsistent with the decision here. None of the parties to the Texas contract requested modification by the Texas commission. What the Texas Supreme Court found improper was the commission's application of one regulation to invalidate the contract, when so doing would be in conflict with both another Texas regulation and the FERC regulations. In the instant case, Mon Valley, one of the parties to the contract, did request that the PUC extend the milestone dates. Also, the extension of the milestone dates was in no way in conflict with either state or FERC regulations.

In fact, petitioners' argument that §292.301 precludes extending milestones is disingenuous since Armco/Allegheny itself previously argued that the PUC should reduce the *negotiated rate* set out in the original EEPA.

Before the ALJ, Armco/Allegheny argued that the PUC should have reduced rates so that the purchase from qualifying facilities would be *less* than avoided cost. Implicit in Armco/Allegheny's request was a presumption that the PUC has authority to change the payment provisions of a contract voluntarily entered into. Of course the contention that payments by the utility should be reduced conflicts with the *Gulf States* holding.

In this case there is no holding that the PUC has substantial authority to modify contracts, thus there is certainly *no conflict* with determinations of other highest state courts as to the extent of such authority. Neither the PUC nor Mon Valley has argued for extension of such authority to questionable or controversial lengths—the exercise here was the administrative act of maintaining the status quo by replacing an unworkable set of "milestone dates," the application of which would have *terminated t*he Mon Valley/West Penn agreement the PUC found to be consistent with and thus required by PURPA, with milestone dates tied to the conclusion of the appealed proceedings.

Petitioners next cite the case of *In Re Vicon Recovery Systems,* 572 A.2d 1355 (Vt. 1990) *(Vicon).* The arguments in that case are more than a little confusing, but it appears the state commission rejected a contract calling for payments at rates above avoided cost when the contract was submitted for approval. The qualifying facility appears to have argued that the contract was allowable under PURPA and the FERC regulations, which in turn "preempted" state statutory authority. The qualifying facility claimed the utility commission could only exercise PURPA authority, and since the FERC regulations allowed voluntary price agreements under 18 C.F.R. §292.301, the commission could not disapprove the contract on the basis that payments exceeded avoided costs. The Vermont Supreme Court disagreed, finding there was no preemption of state authority by PURPA under those circumstances and that 18 C.F.R. §292.301, while permitting parties to agree on terms in excess of avoided cost, did not deprive the com-

mission of authority to approve or disapprove such contracts. Thus *Vicon* stands for a result opposite to that suggested by petitioners—there, the commission disapproved a voluntary contract.

The third case cited by petitioners, *Water Power Co., Inc. v. Pacificorp*, 99 Or. App. 125, 781 P.2d 860 (1989), *review denied*, 309 Or. 291, 787 P.2d 887 (1990), *cert. denied*, 498 U.S. 811 (1990) *(Water Power)*, is also not in conflict with the decision here. There the qualifying facility wished to sell power to a utility where the power would have to be transmitted through other utilities. The purchasing utility required a transmission agreement. Negotiations began in 1982 but the utility's avoided cost rate schedule changed to lower rates in 1983. Since it had not obtained an agreement satisfactory to the purchasing utility, in October of 1983, the qualifying facility asked the PUC to decide whether it was entitled to the higher 1982 rates. The Oregon Commission decided that the utility *must* sign such an agreement but could demand a written plan to transmit the power.

The parties were still haggling by the end of 1984. The commission decided the purchasing utility was entitled to control the point of delivery, but gave the qualifying facility an *extension of time*, until November 1, 1985, to obtain the agreement. The parties signed a power sales agreement, but the qualifying facility did not get a transmission agreement.

In a breach of contract action, the qualifying facility contended the utility had an absolute obligation to buy its power under PURPA and Oregon legislation and regulations, so the utility could not enforce the contract provision requiring a transmission agreement, even though the qualifying facility had agreed to the provision. The Oregon court concluded that the qualifying facility was not excused from that provision. This was a completed contract to which the state regulatory commission had given final approval (not one being litigated before it) and the commission had given the qualifying facility a time extension.

The specific effect of the holding in *Water Power* is that the qualifying facility was not entitled to damages for breach of contract, since the utility did not breach the contract by insisting on a transmission agreement. The Court declined to find there was anything in PURPA or state law that would have limited the authority of the utility and qualifying facility to agree on such a provision.

The next case cited is *Bates Fabrics, Inc. v. Public Utilities Commission*, 447 A.2d 1211 (Me. 1982) *(Bates)*. In that case, the qualifying facility and the utility reached a contract for the sale of the QF's electricity about two years before passage of PURPA. Subsequent to promulgation of the FERC regulations and a Maine statute paralleling the FERC regulations, the qualifying facility sought to have the state regulatory commission revise the contract so the utility would pay avoided cost rather than the lower contract price. The Maine commission declined to modify the contract noting that under the Maine statute the parties had mutually agreed on a price for the sale of electricity, thus the commission had no authority to change that price. The Supreme Court of Maine agreed and noted that the FERC regulations and the comments by FERC indicated there was no intention that contracts prior to PURPA were to be changed pursuant to PURPA or the FERC regulations The question in the instant case was not whether to modify a provision in an ongoing pre-PURPA contract to confer an additional benefit on one of the parties, as in *Bates*, but rather whether the PUC could exercise its authority under PURPA to direct West Penn to extend the milestone dates so this project could potentially survive.

None of these decisions is inconsistent with the Court's decision that the contract milestones could be extended in the Mon Valley/West Penn contract. In *Gulf States*, none of the contracting parties sought modification of the terms, but the commission arbitrarily sought to limit cost recovery by applying one of its regulations in a manner inconsistent with another regulation. In *Bates*, there was a pre-PURPA contract which was voluntarily agreed upon and which had been in effect for years. The Court found no rea-

son under PURPA or state statute to disturb the provisions of that contract. In *Water Power,* the commission had acted to direct the parties to extend certain completion dates previously and had clearly stated the utility was entitled to approve the point of interconnection. The Court found it was entirely consistent with PURPA to allow the parties to voluntarily make such a bargain and there could be no breach of contract from the utility insisting upon compliance with that term. The Vermont Court in *Vicon* approved rejection of a voluntary contract, while the Texas Court reversed rejection of such a contract. However, both cases involved rates that were above avoided costs, while this case does not involve rates. In fact, Pennsylvania had full evidentiary hearings on rates and many other contract circumstances, a process which did not occur in the other states. Finally, the cases were based on PURPA implementation in individual states, and the FERC regulations permit flexibility to the states in deciding how and when avoided costs should be calculated, so differences among states in that regard do not present a "conflict" to be resolved by this Court.

Astonishingly, Armco/Allegheny, the very party that insisted upon PUC review of the contract in question, that demanded the PUC find the contract price excessive under PURPA, that argued for the application of the FERC rules (18 C.F.R. §292.304(d)(2)) to require recalculation of the contract price on the contract signing date, that argued PURPA constraints three times before Pennsylvania appellate courts, knowing all the time the contract was negotiated, rather than mandated by the PUC, now asks this Court to invalidate the contract on the basis that it was "voluntary" under 18 C.F.R. §292.301, and thus entirely beyond the power of the PUC, under PURPA, to extend milestone dates. If accepted, this argument can only mean the PUC should never have reviewed the contract in the first place, and that Armco/Allegheny several times misrepresented that PURPA applied to this case.

West Penn contends the PUC lacked PURPA authority to review the submitted contract and to extend milestones

and update the capacity schedule. Yet West Penn agrees the PUC has authority to approve pass-through of the contract rates, and to approve the contract as complying with PURPA. West Penn also asked the PUC to direct publication of the order in the Pennsylvania Bulletin. Finally, the contract stated it would not become effective until there existed a final, non-appealable PUC order giving all requested approvals. Since publication of the order could lead to someone attacking the contract, West Penn itself recognized the PUC has authority to review the contract for consistency with PURPA.

We submit that extension of the milestones and other changes were appropriate and the contract appropriately used all the terms, including price, on which West Penn and Mon Valley had previously agreed, and the price should not be recalculated as of the date of the PUC's order. If the contract were outside of PURPA, then certainly West Penn would have asked the PUC to find that to be the case in a declaratory order, which it did not do. Many QF/utility contracts are negotiated, at least partially, even under bidding programs. If West Penn's argument, that all such contracts are outside of the FERC regulations, were correct, then state courts could not interpret those regulations as requiring or allowing examination of rates or any other terms of negotiated contracts. This means FERC developed a regulatory plan that would not apply in most situations, and PUC contract review would be unnecessary. Clearly, not even petitioners take this view seriously. Petitioners are really saying a utility can take a QF entirely outside the FERC regulations, by signing a contract, and then the utility can deprive that QF of PURPA benefits it would have had, had it not signed the contract. This is certainly not the intent of PURPA or the FERC regulations. There is no conflict with other states nor were the PUC or Pennsylvania court in error in interpreting PURPA.

II. The PUC held full evidentiary hearings, determining that rates under the contract were below full avoided costs and just and reasonable. The Pennsylvania courts correctly determined nothing in PURPA or the FERC regulations required recalculation of contract rates on the date of the PUC order.

Petitioners have taken shifting views of the date on which calculations of avoided costs should be made throughout this proceeding. However, they attempt to create an impression that the unanimous Pennsylvania courts, and the PUC, approved rates above avoided costs and "violated PURPA," since those authorities gave no credence to the preposterous idea that the date of the PUC order, at the end of evidentiary hearings, was the date on which calculations of avoided costs should be made. Petitioners' current theory seems to be that, although they caused and participated in extensive proceedings before the PUC, nonetheless Mon Valley had to wait until the very end of the modification proceedings before it could be "committed" to a legally enforceable obligation to sell power. The theory is nonsensical. First, Mon Valley executed a contract on October 15, 1987, so it clearly "committed" to sell power, at the latest, by that date. Second, there were full evidentiary hearings concerning West Penn's need for capacity, avoided cost pricing and other factors, all premised on Mon Valley having committed to sell power. The conclusion was that the price was below full avoided costs, so the decision cannot conflict with decisions from other states finding payments were in *excess* of avoided costs, particularly when there were not evidentiary hearings in those cases, including *Petition of East Georgia Cogeneration*, 158 Vt. 525, 614 A.2d 799 (1992). Also, in the face of these exhaustive hearings, the petitioners' claim that the PUC gave "no weight" to whether the rates were "just and reasonable" is a blatant misstatement.

Petitioners' cite the Idaho decision in *A.W. Brown Company, Inc. v. Idaho Power Co.*, 121 Idaho 812, 828 P.2d 841 (1992), to show a qualifying facility must "commit"

itself. That case considered whether a qualifying facility should be "grandfathered" into qualifying for rates that were above current avoided costs. The Idaho PUC determined that small power producers could be grandfathered into higher rates by meeting certain criteria. 828 P.2d at 843. The qualifying facility had to have actively negotiated for a contract, which was then refused by the utility. Brown, however, did not engage in meaningful negotiations. Rather, Brown had asked about rates and later received a reply letter from the utility in response to its inquiry. Accordingly, the Idaho Commission and Supreme Court concluded that because there were no meaningful negotiations Brown would not be grandfathered. The result in *A.W. Brown,* is consistent, *not* inconsistent with the instant case, since Brown *could* have "locked-in" the rates simply by negotiating. Here, Mon Valley signed a contract, which certainly qualified as a commitment.

The timeframe for deciding when a legally enforceable obligation occurs may differ from state to state without violating PURPA. By any standards, however, Mon Valley had done everything it could do to create a legally enforceable obligation by October 15, 1987, when it signed the contract. Petitioners attempt to mislead this Court into thinking a substantial sum of money is involved by claiming it had no need for capacity on the date of the PUC's order on January 4, 1992. There is certainly no fact of record indicating that West Penn had no future need for the MW of capacity on that date, particularly when it had originally planned to build 900 MW of utility-owned, more expensive plant. (239a).

Further, there is no reason to believe the PUC erred in exercising its discretion under the FERC regulations. As this Court stated in *Chevron v. Natural Resources Defense Council,* 467 U.S. 837 (1984):

> "The power of an administrative agency to administer a congressionally created . . . program and the making of rules to fill any of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." Morton v. Ruiz, 415 U.S. 199, 231 (1974). If

> Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. n12. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency. n13

467 U.S. at 843-844 (footnotes omitted).

In this case, there is both a delegation of statutory authority directly under PURPA and an express delegation of authority under the FERC regulations to "elucidate" PURPA and the FERC regulations. Specifically, the FERC regulations confer upon state commissions the authority to promulgate regulations (18 C.F.R. §292.401(a)) and the flexibility to determine the methodology for the calculation of avoided capacity payments. (45 *Fed. Reg.* 12226; 18 C.F.R. §292.304(b) and (e)). Thus absent some compelling demonstration of agency wrong-doing, the PUC's decision should not be disturbed.

The party (Armco/Allegheny) which originally won its contention that rates should be calculated as of contract signing (October 15, 1987) should not now be heard to complain the date should be January 14, 1992[8] so it can drag the proceedings out longer. Petitioners indicate their true objective, in claiming that "In a falling avoided-cost market, however customers can be severely prejudiced by an interpretation of that [FERC] rule favoring developers." Petition, p. 29. So while they have argued that the Pennsylvania decisions were wrong, they really wish to attack the

[8]The precise claim is unclear, since the Petition refers to 1991 (p. 26), but the PUC order was entered January 14, 1992.

FERC rules. Thus they would have this Court accept this case involving an insubstantial 80 MW capacity plant, reversing a holding one of them argued for, to decide policy questions so that states do not interpret the FERC rules in favor of developers, and to insure this contract does not go forward. This Court has already upheld the FERC regulations, in *American Paper Institute v. American Electric Power Service Corp.*, 461 U.S. 402 (1983); it need not reaffirm that decision nor do petitioners need "guidance" on whether the date on which Mon Valley signed the contract is the date for payment calculation.

CONCLUSION

There is no federal question of any importance, thus the petition for writ of certiorari should be denied.

Respectfully submitted,

Lee E. Morrison